SUPREME COURT, U.S.
FILED

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No. 03 1434 APR 13 2004

In The Supreme Court of the United States

NIELS LAUERSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Is the Due Process Clause of the Fifth Amendment or Title 28 U.S.C. § 455(a), violated by the appearance of impropriety from a financial interest in the criminal case being found within the judiciary?

II. Is enhancing the defendant's sentence from a base offense level of conviction at level 6 to level 33 a violation of the Fifth and Sixth Amendments of the United States Constitution?

Table Of Contents

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATIONS TO PRIOR OPINIONS 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 4

I. The district court violated criminal defendant Dr. Niels Lauersen's due process right to a fair trial when it disclosed financial interests in the case in violation of Title 28 U.S.C. § 455(a) 4

II. The defendant's right to Due Process under the Fifth Amendment and Right to Jury Trial and Notice of the Sixth Amendment was denied 23

CONCLUSION 30

Table Of Authorities

Page(s)

Cases

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813, 105 S. Ct. 1580,
89 L. Ed. 2d 823 (1986) 12, 21

Apprendi v. New Jersey,
530 U.S. 466 (2000) ..... *Passim*

Arizona v. Fulminante,
499 U.S. 279, 111 S. Ct. 1246,
113 L. Ed. 2d 302 (1991) 7

Chapman v. Cal.,
386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 7

Chase Manhattan Bank v. Affiliated FM Insurance Company,
343 F.3d 120 (2nd Cir 2003) 6, 22

Connally v. Georgia,
429 U.S. 245, 97 S. Ct. 546, 50 L. Ed. 2d 444 (1977) ... 12

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 10

Dowling v. United States,
493 U.S. 342, 110 S. Ct. 668,
107 L. Ed. 2d 708 (1990) 9

Edwards v. United States,
523 U.S. 511 (1998) 27

F.T.C. v. Cement Institute,
333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948) 12

Gibson v. Berryhill,
411 U.S. 564, 93 S. Ct. 1689,
36 L. Ed. 2d 488 (1973) 13

In re Murchison,
349 U.S. 33, 99 L. Ed. 942,
75 S. Ct. 623 (1955) 11, 12, 13

Jones v. United States,
526 U.S. 227 (1999) 26

Kidder, Peabody & Co. v. Maxus Energy Corp.,
925 F.2d 556 (2nd Cir. 1991) 18

Liljeberg v. Health Services Corp.,
486 U.S. 847, 100 L. Ed, 2d 855,
108 S. Ct. 2194 (1988) ..... *passim*

Marshall v. Jerrico,
466 U.S. 238, 64 L. Ed. 2d 182,
100 S. Ct. 1610 (1980) 10, 11, 13

Medina v. California,
505 U.S. 437, 112 S. Ct. 2572,
120 L. Ed. 2d 353 (1992) 9

Meyer v. Nebraska,
262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) 8

Mistretta v. United States,
488 U.S. 361 (1989) 26, 27

Murray v. Scott,
253 F.2d 144 (9th Cir. 1992) 18

Offutt v. United States,
348 U.S.11, 99 L. Ed. 11, 75 S. Ct. 11 (1954) 11

Patterson v. New York,
432 U.S. 197 (1977) 26

R. v. Sussex Justice, Ex p., McCarthy,
[1924] 1 K-B-256 5

Rochin v. California,
342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) 9

Rose v. Clark,
478 U.S. 570, 106 S. Ct. 3101,
92 L. Ed. 2d 460 (1986) 7

Speiser v. Randall,
357 U.S. 513 (1958) 25

Tumey v. Ohio,
273 U.S. 523, 71 L. Ed. 749, 47 S. Ct. 437 (1927) 11

United States v. Coach,
896 F.2d 78 (5th Cir. 1990) 21

United States v. Feldman,
983 F.2d 144 (9th Cir. 1992) 18

United States v. Lauersen, et al.,
348 F.3d 329 (2nd Cir. 2003) ..... *passim*

United States v. Salerno,
481 U.S. 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) 7

Ward v. Village of Monroeville,
409 U.S. 57, 34 L. Ed. 2d 267,
93 S. Ct. 80 (1972) 12, 21

Washington v. Glucksberg,
521 U.S. 702, 138 L. Ed. 2d 722,
117 S. Ct. 2258 (1997) 10

Withrow v. Larkin,
421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)....13

Constitutional Provisions

U.S. CONST. amend V ..... *passim*

U.S. CONST. amend VI ..... *passim*

Statutes

18 U.S.C. § 371 28

18 U.S.C. § 1035 28

18 U.S.C. § 1341 28

18 U.S.C. § 1347 28

18 U.S.C. § 1512(b) 28

18 U.S.C. § 3231 2-3

18 U.S.C. §§ 3551-3673 27

18 U.S.C. § 3742 28

28 U.S.C. § 455 ..... *Passim*

28 U.S.C. § 455(a) ..... *Passim*

28 U.S.C. § 455(b) 2, 15, 19

28 U.S.C. § 455(b)(4) 14, 17, 18, 20

28 U.S.C. § 455(c) 2, 19

28 U.S.C. § 455(d) 19

28 U.S. C. § 455(e) 19

28 U.S.C. § 455(f) 2, 18

28 U.S.C. §§ 991-998 27

28 U.S.C. § 1254(i) 1

28 U.S.C. § 1291 ..... 1, 3

Guidelines

U.S.S.G. § 2B1.1(a) 24

U.S.S.G. § 2F1.1(a) 24

U.S.S.G. § 2F1.1(b)(1)(N) 24, 29

U.S.S.G. § 2F1.1(b)(2)(B) 24

U.S.S.G. § 2F1.1(b)(8)(B) 4, 25

U.S.S.G. § 3B1.3 25

U.S.S.G. § 3C1.1 25

U.S.S.G. § 5G1.2(d) 28

Other

Guide to Codes of Conduct at I-6, Canon 3(C)(1)(c) 17

In Hawkins, 2 Please of the Crown, Bk. 2, ch 8, 68, 69 11

Petitioner, Dr. Niels Lauersen, respectfully petitions this Honorable Supreme Court of the United States for a Writ of Certiorari to review the Order of the Court of Appeals for the Second Circuit affirming the conviction in District Court.

CITATIONS TO PRIOR OPINIONS

The opinion of the United States Court of Appeals from the Second Circuit can be found at Appendix 1a and is published (*U.S. v. Lauersen, et al.*, 348 F.3d 329 (2nd Cir. 2003), argued June 16, 2003 and decided September 15, 2003 (amended November 25, 2003). The Court's Order denying Petitioner's Petition for Rehearing was entered November 24, 2003 (Appendix 46a), and the Order denying the Petition for Rehearing En Banc was entered December 31, 2003. (Appendix 44a)

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit had jurisdiction from the conviction in the District Court under Title 28 U.S.C. § 1291. The Second Circuit Decision and Order was issued on September 15, 2003. A Petition for Rehearing and Rehearing En Banc was denied for Appellant on November 24, 2003, without prejudice for resubmission of the Request for Rehearing En Banc. The Government's Petition for Rehearing was granted, subject to briefing and oral argument. The resubmitted Petition for Rehearing En Banc was denied December 31, 2003. The final decision and order for the Panel Rehearing was issued on March 24, 2004. (Appendix iaa).

This Honorable Supreme Court has jurisdiction for this Petition for a Writ of Certiorari under Title 28 U.S.C. § 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following are set forth in Appendix 142a-150a.

Fifth Amendment

Sixth Amendment

Title 28 U.S.C. § 455(a)

Title 28 U.S.C. § 455(b)

Title 28 U.S.C. § 455(c)

Title 28 U.S.C. § 455(f)

STATEMENT OF THE CASE

This case deals with an obstetrician/gynecologist fertility specialist, who has been singled out by the government for alleged fraudulent health care insurance billing. These alleged fraudulent claims were for fertilization techniques performed on behalf of women who cannot conceive a child. In vitro fertilization, IVF, Gametes intra fallopian transfer, GIFT and Zygote Inter Fallopian Transfer, ZIFT were utilized.

This prominent Manhattan physician has authored over thirteen women's health care books, three academic textbooks along with almost 100 research papers on gynecology, pregnancy and infertility.

Dr. Niels Lauersen was convicted after a two month jury trial on January 9, 2001. Defendant's sentence was increased from a base offense level of 6 and possible probation, to level 29 and 87 months incarceration by enhancements. This trial commenced after a first criminal trial ended in a hung jury early in 2000.

The United States District Court for the Southern District of New York entered judgment and conviction on October 15, 2001 against Dr. Niels Lauersen. Jurisdiction was based on Title 18 U.S.C.

§ 3231. Notice of Appeal was filed October 16, 2001 to the United States Court of Appeals for the Second Circuit under Title 28 U.S.C. § 1291 jurisdiction. (Appendix 66a)

The basis of appeal is the appearance and actuality of partiality on part of the presiding Judge at both trials, the Honorable William Pauley III.

The Honorable Lewis A. Kaplan originally assigned to this case, recused himself. Judge Pauley admitted owning 400 shares of AXA, which Equitable, a restitutionary insurance company victim for both trials, had demutualized and distributed its shares to in 1992. (Appendix 123a). When Judge Pauley was assigned to the first trial proceedings, his wife had interests in Prudential ("AETNA"), AT&T, and Equitable ("AXA"). Judge Pauley had already ruled on substantive decisions, including denial of a motion to dismiss before his wife sold the AT&T stock.

Exhibit GX500, listing AETNA, Prudential, and Equitable, was prominently used at both trials and involved almost 150 pages of trial transcript testimony in the record of the second trial alone.

Judge Pauley was further alerted to the criminal proceeding having a conflict of interest, by a request for a *Curcio* hearing from the Government. He inquired into the prior representation of insurance company restitutionary victims, by Dr. Lauersen's counsel, Gibson, Dunn and Crutcher. (Appendix 156a)

A case agent of Equitable was directly and cross-examined during the second trial, (Appendix 155a). The Appeals panel was mistaken when it stated Equitable was not mentioned at either trial in relation to Judge Pauley's knowledge of his pecuniary interest. (Appendix 1a-158a)

On June 6, 2001, Judge Pauley alerted the parties that he had found a possible conflict of interest violation of Title 28 U.S.C. § 455(a) in the defendant's pre-sentence report. (Appendix 42a). He stated at oral hearing June 12, 2001, that he owned 400 shares of AXA

valued at $35.75 each, and an annuity worth $50,000 to $100,000 in Prudential. (Appendix 121a-123a).

A status conference was held on July 10, 2001, and Judge Pauley recused himself from the proceedings for the "appearance of impropriety." (Appendix 95a). AUSA Chung sent letters asking the recused Judge to reconsider. These letters requesting reinstatement bypassed standard motions practice rules, including no certificate of service. (Appendix 74-76a, 78a, 93a, 135a). The recused Judge Pauley reinstated himself on July 27, 2001 (Appendix 39a) and sentenced Dr. Lauersen October 15, 2001. (Appendix 67a).

Dr. Lauersen appealed to the United States Court of Appeals. (Appendix 66a). The oral argument was held on November 4, 2002. After argument, the Appeals panel issued a ruling on May 13, 2003. This stated for analogous reasons, the panel was recusing themselves from this case due to a conflict of interest. (Appendix 35a-37a, 36aa).

A second panel heard oral argument on June 16, 2003. This panel issued a decision and order affirming the district court conviction and in addition ordered resentencing with a 4 level increase under § 2F1.1(b)(8)(B). This will possibly increase defendant's sentence to level 33 and a sentencing range of 135-168 months.

REASON FOR GRANTING THE WRIT

I. THE DISTRICT COURT VIOLATED CRIMINAL DEFENDANT DR. NIELS LAUERSEN'S DUE PROCESS RIGHT TO A FAIR TRIAL WHEN IT DISCLOSED FINANCIAL INTERESTS IN THE CASE IN VIOLATION OF TITLE 28 U.S.C. § 455(a).

The District Court Judge had the "appearance of impropriety" by presiding over a health care fraud criminal trial, which he owned stock in a restitutionary insurance provider victim.

This case shows an urgent need of the Courts for a standard of recusal when the appearance of impropriety occurs, especially at a

criminal proceeding. The *Lauersen* case is a chance for this Honorable Court to provide guidance and is of national importance.

This situation of inconsistent decisions among courts leads all the way to the Supreme Court where a recusal issue has been in the public attention. The Supreme Court does not even have a standard for recusal when one of its own Justices is in question for an appearance of impropriety, due to a conflict of interest concern. Most recusals on the Supreme Court occur for financial conflicts. This question is of vital importance for our society.

The case of *R. v. Sussex Justice, Ex p., McCarthy*, [1924] 1 K-B-256 is famous for the aft-quoted statement of Lord Hewart, C.J. at p. 259:

> "... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

The *Lauersen* case is in direct conflict with other circuits, and Supreme Court authority. It is the principal upon which these cases are being subjectively decided, instead of a bright-line rule eliminating all discrepancies, that mandates action by this Honorable Court. Different standards seem to apply in cases of conflict between civil and criminal proceedings. Often the criminal proceeding results in fundamental unfairness and constitutional violation.

This recusal area of dispute has reached almost emergency proportions and is not of the wait and see variety. The conflict predating from lower courts is widespread and the non-recusal decisions in certain cases have become intolerable. The time has come for uniformity of recusal decisions.

The amount of litigants being affected by recusal situations is increasing. The financial interest area becomes more important due to a judiciary preserving its wealth in the financial markets. Judges

preside over increasing cases of fraud and various crimes in civil suits and criminal actions involving financial institutions.

The *Lauersen* issue of recusal will serve throughout the judiciary. The varying decisions among and within circuits can cause forum and judge shopping. *Lauersen* is not only important on its own merit, but shows a national problem with recusal that has infected the judiciary all the way to this Honorable Supreme Court.

This Honorable Court should grant certiorari under Supreme Court Rule 10.

A United States Court of Appeals has entered a decision in conflict with the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory authority.

A United States Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The *Lauersen* decision is in direct conflict with a similar decision granted by a different panel one week before by the Second Circuit Court of Appeals. *Chase Manhattan Bank v. Affiliated FM Insurance Company,* 343 F.3d 120 (2nd Cir 2003). Judicial impartiality is a constitutionally relevant question of national importance for this Court to decide. The nuances and differences between Due Process of the Fifth Amendment and violation of Title 28 U.S.C. § 455(a) and (b), cry out for determination because of all the conflicting authority among the federal courts and judiciary.

Due Process Violation

Structural Error

Judge Pauley's failure to alert the defendant to the Court's financial interests in the criminal case is a direct violation of the Due Process Clause of the Fifth Amendment. This non- disclosure was structural error in the criminal trial proceeding before

commencement. The automatic reversal error impacted on defendant's right to a fair trial by a neutral impartial judge. "There are some constitutional rights so basic to a fair trial that that their infraction can never be treated as harmless error." *Chapman v. Cal.*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), noted that such violations deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." "And because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless error standard cannot apply" Id. This impropriety of a financial interest by Judge Pauley in the district court criminal proceeding is a "structural defect affecting the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). "Rather than an error in the trial process itself" Id.

The Due Process Clause of the Fifth Amendment provides that "No person shall...be deprived of life, liberty, or property, without due process of law..." The Due Process Clause protects individuals against two types of government action. Substantive due process prevents the government from engaging in conduct that "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty. When government action depriving a person of life, liberty, or property survives "substantive due process" scrutiny, it must be implemented in a fair manner. This requirement has traditionally been referred to as "procedural" due process. *U.S. v. Salerno*, 481 U.S. 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The due process question is fairly included therein the Court of Appeals Title 28 U.S.C. § 455 recusal decision. (Appendix 1a).

Liberty Interests

Dr. Lauersen had a liberty interest at stake in his criminal trial. Substantive due process is guaranteed by the Fifth Amendment of the Bill of Rights for life, liberty, and property. Procedural Due Process is guaranteed by the Fifth Amendment of the Bill of Rights to have a fair trial with an impartial judge. Dr. Lauersen has a right to fundamental fairness and due process of law at his criminal proceeding.

This Court has said that liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)

Dr Lauersen's freedom from these liberties has been removed after conviction. The above substantive constitutional rights were lost, along with property from restitutionary claims after his unfair trial.

Substantive and Procedural Due Process Denial

Dr. Lauersen's substantive due process rights were violated when his presumption of innocence was removed by a defective conviction at an unfair trial.

This conviction was upheld by the district court trial judge, first recusing himself for being a stockholder in a restitutionary victim, then reinstating himself when the government obtained a waiver from the insurance companies' claim. The defective conviction and the later procedural sentencing and the 2nd Circuit Court of Appeals' decision to uphold the district court's method and decision, have risen to a point of denial of due process.

The test for independent content of due process that exists separately from the exact terms is whether the violation of a fair trial by partial judiciary "offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992).

This Court has noted "beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation and will be construed very narrowly." *Dowling v. United States*, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

Notwithstanding the above statement, independent due process has emerged as a major source of constitutional regulation at trial. A fair trial environment and independent, impartial judiciary has been repeatedly stressing historical acceptance and is a strong indicator of fundamental fairness. This area of our society has traditionally been held by due process to formulate per se prohibitions and automatically presume prejudice. The *Lauersen* conflict of interest decision affects all criminal proceedings involving recusal. The appearance of impropriety has reached a due process violation level.

In *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952) this Court stated, "Due process of law, as a historic and generative principle, precludes defining, and thereby confirming, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'"

The conflict of interest in the appearance of partiality by the Judge in *Lauersen*, offends the due process protection of the individual in our society. This conflict is further propagated by the conflict within the constitutional rights of the individual and the statutory rights under Title 28 U.S.C. § 455 et al. The conflict is causing the fundamental fairness of trial by an impartial judge to be subjectively justified in court cases. This happened in *Lauersen* by

Judge Pauley's and the Second Circuit Court of Appeals panel decisions.

This is the reason review of the recusal policy in the United States judiciary is of constitutional and supreme importance. The subjective review by a biased judiciary violates the concept to ordered liberty implicit in the fundamental fairness concerns of a criminal defendant at trial. The importance of this question of recusal especially in a criminal proceeding is fundamental to justice and liberty.

Justice Scalia, with whom Justice Thomas joined concurring in the judgment in *County of Sacramento v. Lewis*, Id. stated, "Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition...and implicit in the concept of ordered liberty'...Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest....Our Nation's history, legal tradition, and practices thus provide the crucial' guideposts for responsible decision making,'....that direct and restrain our explanation of the Due Process Clause." *Washington v. Glucksberg*, 521 U.S. 702, 720-722, 138 L. Ed. 2d 722, 117 S. Ct. 2258 (1997).

The Process Due

The interpretation of what process is due this criminal defendant, has long ago been determined. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. The requirement of neutrality helps to guarantee that life, liberty, or property will not be taken on a basis of an erroneous or distorted conception of the facts of the law." *Marshall v. Jerrico*, 466 U.S. 238, 64 L. Ed. 2d 182, 100 S. Ct. 1610 (1980).

The requirement of neutrality has been zealously guarded by this Court. In *Tumey v. Ohio*, 273 U.S. 523, 71 L. Ed. 749, 47 S. Ct. 437 (1927), the Court reversed convictions rendered by the mayor of a town when the mayor's salary was paid in part by fees and costs levied by him acting in a judicial capacity. The Court stated that the Due Process Clause would not permit any "procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice, clear, and true between the State and accused" (*Marshall v. Jerrico* Id.)

Tumey states "There was at common law the greatest sensitiveness over the existence of any pecuniary interest however small or infinitesimal in the justice of the peace. *In Hawkins*, 2 Please of the Crown, Bk. 2, ch 8, 68, 69.

"Justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S.11, 14, 99 L. Ed. 11, 75 S. Ct. 11 (1954).

This "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. 33, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955). "A fair trial in a fair tribunal is a basic requirement of due process." Id.

Financial Interest Needed for Due Process Violation

The district court's Judge Pauley owned 400 shares of AXA, previously Equitable. The Judge did not give notice to defendant during the first trial ending in a hung jury, nor in the second trial's guilt phase ending in a conviction. Equitable was on chart GX500 as a restitutionary victim. It was also mentioned on cross-examination twice in the second trial. These AXA (Equitable) shares are worth $35.75 each. Judge Pauley's wife held an annuity with Prudential worth $50,000 to $100,000. The Judge did not even inquire to the exact amount of the annuity. (Appendix 123a)

The Supreme Court has analyzed recusal by noting that "most matters relating to judicial disqualification do not rise to a constitutional level." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 105 S. Ct. 1580, 89 L. Ed. 2d 823 (1986). (quoting *F.T.C. v. Cement Institute*, 333 U.S. 683, 702, 68 S. Ct. 793, 804, 92 L. Ed. 1010 (1948), for the Constitution does not reach every issue of judicial qualification." 475, U.S. at 821, 1065 S. Ct. at 1585.

The Court acknowledged, however, that, "what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.'" 475 U.S. at 822, 106 S. Ct. at 1585 (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955).

The *Aetna* Court adopted as a "reasonable formulation" the inquiry whether the "situation is one 'which would offer a possible temptation to the average judge to...lead him not to hold the balance nice, clear, and true" 475 U.S. at 822, 106 S. Ct. at 1585 (quoting *Ward v. Monroeville*, 409 U.S. 57, 60, 93 S. Ct. 80, 83, 34 L. Ed. 2d 267 (1972).

Applying this due process standard to the case before it, the Court concluded that although general allegations of bias and hostility do not rise to a due process violation, the justice's financial stake in the outcome - regardless of whether he was in fact impartial - was "direct, personal, substantial and pecuniary" enough to constitute a violation of the Due Process Clause, *Aetna*, 475 U.S. at 824-25, 106 S. Ct. at 1586-87.

Litigation before financially interested judges and jurors raises fundamental issues of due process, even when the judges' financial interest is relatively small. See *Connally v. Georgia*, 429 U.S. 245, 251, 97 S. Ct. 546, 549, 50 L. Ed. 2d 444 (1977) (paying magistrates a $5 fee for granting a search warrant application, but nothing for denying warrant applications, violates due process); *Tumey v. Ohio*, Id. (paying adjudicator $12 per conviction, but nothing for acquittals, violates due process.)

The Due Process Clause entitles a person to "an impartial and disinterested tribunal" *Marshal v. Jerrico, Inc.*, Id. and that "a fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, Id.

The "probability of actual bias on the part of a judge or decision maker is too high to be constitutionally tolerable when the adjudicator has a pecuniary interest in the outcome." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) (due process violated when members of board with power to bar optometrists from practice had their own private practices in competition with those who came before the board). The Constitution is concerned not only with actual bias but also with "the appearance of justice" *In re Murchison* Id.

Regardless of his personal integrity, "no man can be the judge in his own case or try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625.

This is the dilemma faced by Lauersen. What amount of pecuniary interest of a district court judge in a criminal case violates due process? A fair criminal trial is deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty. How much does any given man value his assets despite their size is only known to that individual.

How can a dollar value be placed upon neutrality and impartiality of the judiciary in a criminal proceeding against a defendant whose life, liberty, and property are at stake? This Court needs to settle this issue.

Title 28 USC § 455(a)

Title 28 U.S.C. § 455(a) states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Judge Pauley owned 400 shares of AXA, an insurance company listed under Equitable, in the criminal health insurance case in which Dr. Lauersen was convicted. Judge Pauley claimed to not know that Equitable and AXA were restitutionary victims in the case until he read the presentence report. The question becomes whether § 455(a) can be violated based on an "appearance of partiality," even though the judge was not conscious of the circumstances creating the appearing of impropriety. The judge should have known.

Liljeberg v. Health Services Corp., 486 U.S. 847, 100 L. Ed, 2d 855, 108 S. Ct. 2194 (1988).

Judge Pauley brought up his financial interest conflict, after trial and before sentencing, stating he believed he should recuse himself under 455(a). This is probably because he believed he did not have the requisite scienter or knowledge needed for a 455(b)(4) violation requiring immediate recusal.

The Judge knew that his lack of knowledge did not eliminate the risk that his impartiality might reasonably be questioned by other people.

The *Liljberg* Court stated, "to read § 455(a) to provide that the judge must know of the disqualifying facts, requires not only simply ignoring the language of the provision - which makes no mention of knowledge - but further requires concluding that the language in subsection (b)(4) - which expressly provides that the judge must know of his or her interest is extraneous." *Liljberg* at 486 U.S. 860.

A careful reading of the respective subsections make clear that Congress intended to require knowledge under subsection (b)(4) and not to require knowledge under subsection (a). *Liljberg* Id.

Standard for Financial Interest Recusal

The issue becomes, when does a financial interest in the decision of a criminal court demand recusal?

"The goal of 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure at heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality...Under 455(a) therefore recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." *Liljberg* at 486 U.S. 860.

Judge Pauley on June 6, 2001, prior to sentencing, stated that he "owned a financial interest in at least one of the entities that is eligible for restitution.", and that "as a matter of prudence, this Court may be required to disqualify itself" under § 455(a). (Appendix 42a)

This is the point where the Judge should be recused both prospectively and retroactively. § 455(b) mandates recusal at this point and cannot be waived by the defendant, the district court, or in the court of appeals, despite a contrary request of waiver by Allen Dershowitz at oral argument. (Appendix 23a, fn. 11).

"Requiring disqualification based on facts the judge does not know would of course be absurd; a judge could never be expected to disqualify based on some fact he does not know, even though the fact is one that perhaps he should know or one that people might reasonably suspect that he does know. But to the extent the provision can also, in proper cases, be applied retroactively, the judge is not called upon to perform an impossible feat. Rather, he is

called upon to rectify an oversight and to take steps necessary to maintain public confidence in the impartiality of the judiciary. If he concludes that his impartiality might reasonably be questioned, then he should also find that the statute has been violated." *Liljberg*, 486 at 861.

Reversible Error

The Second Circuit Court of Appeals ruled in effect, that the error committed in the district court was harmless. The court reviewed facts and law for abuse of discretion.

"As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a). It would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges." *Liljberg*, 486 U.S. at 862 Id.

The Court of Appeals in *Lauersen* affirmed the decision not to recuse by the district court. This is in conflict with relevant Supreme Court authority in this argument. (Appendix 1a)

Section 455(A) Cases in Conflict

The Court of Appeals attempts to quantify Judge Pauley's holdings. "In the pending case, Judge Pauley's and his wife's shares of AXA represent .0009 percent of the victim's insurer's stock. That slight interest, even less significant than the interest termed nonexistent in *Ravich*, would not cause an objective observer to question Judge Pauley's impartiality, once that observer became aware that AXA, a company worth $5.8 billion, had a restitution claim for $13,046." (Appendix 12a). This is the exact area this Honorable Supreme Court needs to address for fundamental fairness especially in a criminal proceeding.

The Court of Appeals continues, "Second, as we have noted, courts construing section 455(a) have ruled that a judge who has an

interest in a crime victim need not recuse unless that interest is substantial." (Appendix 16a). The conflict between courts needs clarification by this Court. These portions of the lower court's decision and order are highly objectionable.

The *Lauersen* court continues, "Third, section 455 and the Code both provide that any interest in a party requires recusal. 28 U.S.C. § 455(b)(4); Guide to Codes of Conduct at I-6, Canon 3(C)(1)(c). This rejection of a de minimis approach to stock ownership of a party suggests that an insubstantial interest in a non-party, even one with some relationship to the case, is not an automatic basis for recusal. See *Liljberg*, 488 U.S. at 860 n.8" (Appendix 14a)

A restitutionary victim insurance provider is either directly or proximately harmed as a result of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern. The conflict of interest between the Judge and the victim has the appearance of impropriety in *Lauersen*.

The *Lauersen* Court states, "For all of these reasons, we decline to adopt a per se rule requiring recusal in every instance where a judge has an interest in the victim of a crime. Instead, we believe that recusal is required only where the extent of the judge's interest in the crime victim is so substantial, or the amount that the victim might recover as restitution is so substantial, that an objective observer would have a reasonable basis to doubt the judge's impartiality. Neither Judge Pauley 's miniscule holding of AXA shares nor the $13,046 that this large company was originally entitled to claim as restitution meet the standard." (Appendix 15a)

Court's Cure

The district court reinstated itself, after initially recusing under § 455(a), by obtaining a restitutionary waiver from Equitable for its $13,046 claim against Dr. Lauersen. This was after the parties were asked to waive their right to recusal and Lauersen refused. The district court judge recused himself sua sponte and later reinstated himself sua sponte.

In *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 561 (2nd Cir. 1991) the judge did not recuse himself even though the judge and his wife owned stock in a corporation directly involved in the case, because he sold the stock as soon as he learned of the relationship between the corporation and the appellant.

If a judge has a financial interest in a case, the judge may continue to hear the case if a significant amount of time has been dedicated to the matter before the judge discovers his or her financial interest and if the judge immediately divests those interests upon discovery. 28 U.S.C. § 455(f).

A judge may not, however, try to separate those aspects of the case in which the judge has a financial interest by recusing himself or herself from only those aspects. Recusal must be from the whole proceeding. *Murray v. Scott*, 253 F.2d 144, 145 (9th Cir. 1992); *United States v. Feldman*, 983 F.2d 144, 145 (9th Cir. 1992)

Judge Pauley did not sell his stock nor recuse himself from the proceeding.

A different Judge should have taken over these proceedings immediately upon recusal and held an evidentiary hearing for retroactive disqualification of Judge Pauley. The Judge had a duty to disqualify himself immediately under § 455(b)(4) and not make any further decisions in the proceeding.

The *Liljberg* standard stated, "We conclude that in determining whether a judgment should be vacated for a violation of

§ 455(a), it is appropriate to consider the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." 486 U.S. 864 Id.

The *Liljberg* Court continued, "When a busy federal judge concentrates his or her full attention on a pending case, personal concerns are easily forgotten. The problem, however, is that people who have not served the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." *Liljberg*, 486 U.S. at 865.

Dr. Lauersen's judgment should be vacated under the *Liljberg* standard. The risk of injustice with a judge having a pecuniary interest in the outcome, whether substantial or not, is not a nexus an impartial judge should have in a criminal trial. This risk whether conscious or not, should not be a gauntlet a criminal defendant has to encounter at a fair trial.

The superficial examination that Judge Pauley conducted on June 12, 2001, was not in depth enough to provide adequate notice to all the past, present, and possible future financial interest ties he had to all the restitutionary victims (insurance companies) and their interlocking concerns. (Appendix 123a). It is well known that insurance companies often pool risks and sell them to similar buyers. Actuarial studies are used by some insurance companies to adjust risk within individual policies. A proper evidentiary hearing by a neutral, impartial and independent judiciary could have reviewed the appearance of impropriety issue under 455(a) objectively and independently of Judge Pauley's subjective assessment. The risk of an unfair trial by a judge in violation of 455(a) and sentencing after recusal for 455(a) and violation of (b), (c), (d), and (e), mandates vacation of the unjust verdict.

A full disclosure at that time would have completely removed any bias for questioning the judge's impartiality and would have made it possible for a different judge to decide whether the interests - and appearance - of justice would have been served by a retrial.

Judge Pauley's failure to disqualify himself permanently on July 10, 2001, constituted a direct violation of 455(b)(4) which disqualifies a judge if he "knows that he, individually or as a fiduciary, has a financial interest in the subject matter in controversy or in a party to the proceeding. (Appendix 119a).

The risk that denial for relief will produce injustice in other cases was never inquired into by Judge Pauley. The *Lauersen* precedent was very valuable to insurance companies for future criminal investigations and charges and with civil litigation for health care fraud. This case is not only favorable to the individual restitutionary victim's future interest, but also to the health care insurance industry as a whole and all the interrelations this insurance company has with other insurance companies. Equitable's (AXA) foregoing of its $13,046 immediately, will pay off in future litigation.

The risk of undermining the public's confidence in the judicial process is obvious to an objective reasonable person. A district court judge who owns stock in an insurance company restitution party involved in a criminal case for health care fraud, against a felony charged medical doctor; removes the sense of fairness within that tribunal.

This entire case contains conflict from the nexus of ex FBI agents working for the insurance companies and the United States Attorney, to exact criminal punishment on a prominent physician and female health care author. Lauersen is alleged to have performed infertility treatment for couples that insurance companies do not cover. The monetary concerns of the health care insurance industry is making an example out of this doctor by criminal, instead of civil trial; forcing other doctors in the industry to conform. This is more conflict and prejudice than any person, being singled out by government action, should ever have to suffer in the United States.

The reconsideration of Judge Pauley's recusal by letter from the AUSA calls attention to the unconstitutional aspects of this case under Due Process considerations. The Judge did not have

jurisdiction in this criminal tribunal once he recused himself. It was not for him to re-decide; only another disinterested judiciary at the trial court level could have jurisdiction.

Due Process v. § 455

Aetna thus instructs that the Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties" 475 U.S. at 825, 1065 S. Ct. at 1587 Id. "The inquiry commanded by Section 455 and that commanded by the Due Process Clause are not the same. The Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so. Section 455 requires disqualification when others would have reasonable cause to question the judge's impartiality. It is this additional, systematic concern for avoiding the appearance of impropriety that makes the section 455 standard for disqualification more demanding than that imposed by the Due Process Clause. At some point the two tests overlap. We conclude that it is this area of overlap that the *Liljberg* Court was referring to when it noted that the concern for public perceptions of judicial integrity has "constitutional dimensions" 486 U.S. at 865 n. 12, 106 S. Ct. at 2205 n. 12, 100 L. Ed. 2d at 875 n.12. (*U.S. v. Coach*, 896 F.2d 78 (5th Cir. 1990).

This biased district court tribunal violated Due Process that requires a neutral detached judge in the first instance. *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972). Generally, an adjudication that is tainted by bias cannot be constitutionally redeemed by review in an unbiased tribunal. *Ward* Id.

The facts of *Lauersen* create precisely the appearance of impropriety that 455(a) was intended to prevent. The violation is neither insubstantial nor excusable. Judge Pauley claims he did not know he owned stock in an insurance company victim when he certainly should have known. The prior judge recused himself and defense counsel had a conflict of interest from representing an

insurance company victim eligible for restitution in the case. This was the second trial, the first ending in a hung jury. The restitution exhibits were in evidence.

The Court of Appeals first panel had to recuse themselves due to conflict of interest in deciding Judge Pauley's conflict of interest. (Appendix 35a-37a, 36aa).

The Court of Appeals unwillingness to enforce § 455 in this case may cause substantive injustice in the future, by not encouraging a judge or litigant to more carefully examine possible grounds for disqualification and promptly disclose them when discovered. This is especially true for large multi-victim litigant actions like *Lauersen*. The problem is allowing a subjective judge to decide objectively whether to recuse because of a financial interest in a criminal case. A non per se standard allows subjective review and decision of a judiciary to decide the effect an amount of money has on that individual's impartiality. This is a defective standard and needs to be addressed by this Honorable Court. The duty to review a criminal case for any financial conflict of interest must owe to the judiciary at the risk of reversal, if not found.

Different Panels - Different Decisions 2d Circuit

The Second Circuit decided virtually the same recusal situation under 455(a) of a judge owning stock in a party corporation in the civil action *Chase Manhattan Bank v. Affiliated FM Insurance Company*, 343 F.3d 120 (2nd Cir. 2003). Judge Pollack claimed he did not know he owned shares of stock in Chase Manhattan Bank. The panel decided a reasonable person would consider a trial judge should know that the bank had merged with one in which he owned stock. These cases are totally inconsistent in their rulings and ramifications, especially because *Chase* was a civil case and *Lauersen* was a criminal case. A criminal case should have a higher standard for recusal because of the liberty interest at stake.

Lauersen Review

The financial interest Judge Pauley had in this criminal case needs to be reviewed on certiorari. The process by which the judiciary needs to be recused should be set down in a standard by this Honorable Court.

A *Lauersen* review should be standardized in any criminal proceeding that could be tainted by a conflict of financial interest with the presiding judge. The inconsistency between and within Circuits cries out for review.

The Petitioner has shown historical, textual, and controlling precedential support for his due process right to a fair trial by impartial judiciary. This is not a case where there is fashioning of a new due process right out of thin air. Our Nation has traditionally protected this value and the right to life, liberty, and property against unfair government intrusion.

II. THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT AND RIGHT TO JURY TRIAL AND NOTICE OF THE SIXTH AMENDMENT WAS DENIED.

The district court violated these Constitutional rights when it sentenced Dr. Lauersen to 87 months at level 29 from a base level of conviction of level 6. The United States Sentencing Guidelines (U.S.S.G.) enhancements should currently be under review by this Honorable Court. The amount of criminal defendants that have had their liberty interests removed by violation of the Constitution is of epedemic national importance. The basic premise of a fundamentally fair trial has been removed from the protections of the Bill of Rights and decided under the subjective analysis of a Judge without the fact finding guarantee of a jury.

This rocks the basic Constitutional foundation on which this great nation is premised. The Attorney General under the Department of Justice keeps pushing for strict enforcement of these

Constitutional violating Guideline Enhancements to the point of Orwellian review of the federal judiciary.

The subjective review of theses enhancements and their application is the recurring theme of endless appeals since the guidelines inception. The judicial economic waste and unfairness to a criminal defendant make the review of these U.S.S.G. enhancements imperative to the federal courts. The burdening prison population has pushed the Bureau of Prisons to its limits of capacity, due to these enhancements by constitutional violations.

This Honorable Court has granted certiorari to a similar case, *Blakely v. Washington*, No. 01-1632. Although a State case, the same enhancement principles apply to the U.S.S.G. sentencing scheme.

This Honorable Court should grant certiorari under Supreme Court Rule 10:

(a) A United States Court of Appeals has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) A United States Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Due Process Violation

Sentence

Judge William Pauley III adopted the following recommendations from Dr. Lauersen's presentence report: (1) a base offense level of six pursuant to U.S.S.G. § 2F1.1(a); (2) a thirteen-level upward adjustment pursuant to § 2F1.1(b)(1)(N), based on an intended loss of approximately $4.9 million; (3) a two-level upward adjustment pursuant to § 2F1.1(b)(2)(B) because Lauersen's offenses involved more than minimum planning; (4) a four-level upward adjustment pursuant to § 2B1.1(a) because Lauersen was a leader and organizer of the criminal activity in question; (5) a two-level upward

adjustment under § 3B1.3 because, in executing his criminal scheme, Lauersen abused the trust of the victim insurance companies, a two-level upward adjustment pursuant to § 3C1.1 based on Lauersen's obstruction of justice.

The Judge sentenced Dr. Lauersen to 87 months, the lower end of the level 29 sentencing range. (Appendix 68a)

On appeal to the United States Court of Appeals for the Second Circuit, the decision and order added a four-level upward adjustment under § 2F1.1(b)(8)(B) because Lauersen's offenses "affected a financial institution" and Lauersen derived over $1 million in gross receipts. (Appendix 30a).

The case was affirmed and remanded for sentencing. The sentencing of a criminal defendant from a charge of conviction of level 6 to level 33 and a sentencing range of 135-168 months by judge rather than a jury violates all semblance of the Due Process Clause of the Fifth Amendment in the United States Constitution.

An offense offends Due Process if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958).

No court is allowed to condone a legislative process that takes away an individual's due process rights in a criminal case. These rights are so basic to the concepts of fairness, liberty, and justice in the United States that serious consideration and review of their violation in Dr. Lauersen's sentencing should be reviewed on certiorari.

Jury Trial

A right to a jury trial is a right to a trial in which the factual issues are determined by a jury, not by a judge. The trial being a formal judicial examination of evidence and determination of legal claims in an adversary proceeding.

The Sentencing Reform Act of 1984 produced the United States Sentencing Guidelines. The enhancements to Dr. Lauersen's sentence were made by a probation officer's report given to the district court judge with many additional factors not proven beyond reasonable doubt at sentencing. These guideline enhancements are sentenced to a defendant, under the standard of proof-preponderance of the evidence, without a jury verdict. The due process command that the burden of proof for conviction at a jury trial is beyond a reasonable doubt.

This process violated the Sixth Amendment right to notice and jury trial. A possible six-month sentence under the U.S.S.G. base offense conduct has been enhanced by the sentencing commission's recommendation for legislation to Congress. This has circumvented the rights under the Fifth and Sixth Amendments and the sentence has been turned into a possible 168-month sentence at the direction of a judge, not jury. This is the process that *Patterson v. New York*, 432 U.S. 197 (1977) tried to prevent.

In *Mistretta v. United States*, 488 U.S. 361, 370 (1989) this Court upheld the constitutionality of the Sentencing Commission and the Guidelines as being non violative of the non-delegation doctrine and the separation of powers principle.

The petitioner's problem arises with the guideline enhancements and their constitutionality. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000) this Court determined, "other than a fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi* 530 U.S. 490 Id. This was the dictum taken from *Jones v. United States*, 526 U.S. 227 (1999).

Guidelines are Statutory

The question becomes, do these enhancements, that are facts that increase a criminal defendant's sentence above the maximum in the prescribed sentencing guideline range, need to be submitted to a jury and proved beyond a reasonable doubt.

The *Apprendi* holding applies to a factor which increases a defendant's sentence, "beyond the maximum authorized statutory sentence. The United States Sentencing Guidelines are statutory by being promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984 and with the guidelines becoming effective on November 1, 1987. Title 18 U.S.C. §§ 3551-3673, Title 28 U.S.C. §§ 991-998 (1994).

"The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held." *Apprendi* Id. 120 S. Ct. at 2366 n. 21 (citing *Edwards v. United States*, 523 U.S. 511, 515 (1998). The Supreme Court needs to review the guideline enhancements for constitutional violations. The guidelines were created by an act of Congress and are subject to constitutional limitation.

Justice Thomas said the majority opinion did not go far enough and suggested the following rule on the Guidelines:

> "If a fact is by law the basis for imposing or increasing the prosecution's entitlement – it is an element. (To put the point differently, I am aware of no historical basis for treating as a non-element a fact that by law sets or increases punishment)." *Apprendi*, 120 S. Ct at 2379 Id.

Justice Thomas also stated:

> "It is likewise unnecessary to consider whether (and, if so, how) the rule regarding elements applied to the Sentencing Guidelines, given the unique status that they have under *Mistretta v. United States*, 488 U.S. 361 (1988). But it may be

that this special status is irrelevant, because the Guidelines have the force and effect of law." Id at 413 (Scalia, J. dissenting). *Apprendi,* 120 S. Ct. at 2380 n.11 (Thomas, J. concurring) Id.

Apprendi impacts on specific offender characteristics and other enhancements. These require the sentence be increased when the sentencing court instead of a jury finds their existence by a preponderance of the evidence. "Require" is used because the Sentencing Guidelines has the force and effect of law. Title 18 U.S.C. § 3742. The total punishment under the Guidelines can violate the Criminal Code statutory maximum under U.S.S.G. § 5G1.2(d) imposing consecutive sentences and *Apprendi.* The sentence enhancements of the U.S.S.G. violate the basic premises of Due Process and Trial by Jury Clauses of the Constitution.

Unconstitutional Sentencing

The Federal criminal code violations and relevant statutory sentencing maximums which the defendant was convicted were: Count 1, 18 U.S.C. § 371 conspiracy count with a sentencing range of 0-5 years. Count 2, 18 U.S.C. § 1347 with a sentencing range of 0-10 years. Counts 3 through 10 and 16 through 19, 18 U.S.C. §§ 1035 and 1341 with a sentencing range of 0-5 years and 18 U.S.C. § 1512(b) and a sentencing range of 0-10 years. Dr. Lauersen's United States Sentencing Guidelines range the Circuit Court has remanded to the district court is for 135-168 months at level 33. This is a direct violation of *Apprendi,* Id.

This Court needs to decide if the U.S.S.G. are statutory maximums in their own right. The recommended sentencing ranges are mandated by the Department of Justice and Congress in the recent Protect Act and Feeney Amendment. The base offense level mandated under the U.S.S.G. for a criminal offense is statutory. Sentencing over this statutory maximum without jury determination is a violation of *Apprendi* and the current interpretation of the Fifth and Sixth Amendments of the Constitution.

The Enhancements

The U.S.S.G. are individually set sentences for conduct of conviction found by the jury. The maximum ranges are the same as any criminal codified law maximum sentence. Convicting Dr. Lauersen of individual counts for health insurance fraud, amounting to several thousands of dollars for each count, and then sentencing him to millions of dollars worth of fraud he was never charged with, nor found guilty by a jury, violates the Constitution and American perception of justice.

"The relevant inquiry is not one of form but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury verdict? *Apprendi* 530 U.S. at 494, 120 S. Ct. 2348. Id.

Dr. Lauersen was sentenced to a 13 level enhancement above the base offense level of 6 for fraud under § 2 F1.1(b)(1)(N) for the U.S.S.G. of $4.9 million. A jury convicted Dr. Lauersen of 12 counts totaling $105,300. This sentencing amount is forty times the amount of the jury verdict in counts of the criminal case. The dollar amount is an element that takes the doctor above the Guidelines' statutory maximum in the offense.

The U.S.S.G. enhancements are created by a quasi judicial body under the authority of Congress and are subject to the same substantive rights restrictions. These guideline enhancements are not exempt from the Bill of Rights.

Guideline Amendments must be submitted to Congress in May to become effective November 1, if Congress does not repeal any given recommendation. The method of approval is a legislative process making these amendments statutory.

Real offense sentencing has turned into a constitutional dilemma within the U.S.S.G. and the criminal courts. Sentences have been enhanced under the U.S.S.G. since 1984 without Constitutional

review. Dr. Lauersen's criminal case is the extreme. The U.S.S.G. enhancements need to be addressed by this Court.

CONCLUSION

The petitioner respectfully requests this Honorable Court grant Certiorari to review these issues of National importance. The recusal issue is especially timely, due to the attention recently in the press between Judicial and Executive branch members. A complete review of the recusal process is needed for the judiciary.

The real issue in both discussions of this submission is the Due Process ramifications that urgently need delineation to resolve questionable practices in criminal cases by the lower courts.

In the alternative, petitioner requests his *Apprendi* sentencing enhancement issue be placed on hold or reversed, if necessary, accordingly, with this Court's decision in *Blakely v. Washington*, No 02-1632.

It is time to review the constitutionality of the United States Sentencing Guidelines enhancements in light of *Apprendi*.

Respectfully submitted,

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